STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1432

State of Minnesota,
Respondent,

vs.

Romeo Orlando Davis,
Appellant.

Filed September 17, 2018
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-CR-17-288

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant argues that the district court plainly erred by failing to give the jury a specific-unanimity instruction. We affirm.

FACTS

On January 12, 2017, A.L. was working at a convenience store when J.W. came in and told her that J.W.'s cousin was going to shoot appellant Romeo Orlando Davis. A.L. told Davis about the encounter. That evening, J.W. and J.K.W. went to the convenience store to buy food and drinks. Davis also went to the store in A.L.'s vehicle to pick A.L. up from work. Davis saw J.W. and went into the store. Davis flashed a silver object at J.W. and then left in A.L.'s vehicle. J.W. and J.K.W. left and called the police.

Police went to the address associated with the vehicle's license-plate number and observed the vehicle parked outside. After approximately 20 minutes, the vehicle pulled out of the lot and police pulled it over. A.L. was driving and Davis was in the passenger seat. Police searched the vehicle and found a silver and black handgun in the trunk. DNA testing was inconclusive as to whether Davis's DNA was on the gun. Davis was charged with possession of a firearm by an ineligible person, and possession of ammunition by an ineligible person.[1]

At trial, J.K.W. testified that during the incident at the store, Davis told J.W. that he "keep[s] a pole on [himself] too" and showed his gun. She testified that she was sure that it was a gun and that she could see the handle. She testified that the gun was silver.

J.W. testified that Davis approached her at the store and said, "'Tell that b-tch to keep my name out her mouth. I keep a pole on me too. And we can get popping or cracking.'" J.W. clarified that "pole" means gun. J.W. testified that Davis lifted a gun out

[1] Davis was also charged with terroristic threats, now known as threats of violence, but those counts were dismissed.

of his sweater and showed her the top of it when he was "a couple inches" from her. She testified that she "kn[e]w it was [a] gun. It look[ed] like a gun." J.W. stated that she could see the handle of the gun, and that the gun was silver and black. J.W. identified the gun found in the trunk of the vehicle as the gun Davis flashed at her.

The state played surveillance video that depicted the incident. The video shows Davis walking into the store and "lift[ing] his arm up when he was talking to [J.W.]" A silver object is visible in Davis's waistline.

Davis testified that he was gesturing with his hands while speaking to J.W. and that a phone in his pocket began vibrating. Davis testified that he reflexively pulled out "a silver phone" with "a black bumper case on it." He denied having a gun.

Davis testified that after the encounter, he and A.L. went home. He denied ever going into the trunk of the car that day. He admitted that he keeps certain items in the car, such as boots and shoes, but testified that other people use the car, including A.L., relatives, and friends. Davis explained that he no longer had the silver cellphone because it belonged to a neighbor. He testified that he "was resetting [the phone] for this person" and that after the encounter, he gave the phone back to the neighbor before he was stopped by police.

Davis never requested a specific-unanimity jury instruction. The district court gave the standard unanimous jury instruction. During closing argument, the state asserted that it had "proven two forms of possession. The video with flashing shows that [Davis] actually has it on his person. When it's discovered in the trunk, he's exercising dominion and control over it with constructive possession."

The jury found Davis guilty as charged, and the district court sentenced Davis to 60 months in prison. This appeal followed.

D E C I S I O N

Davis argues that the district court plainly erred by failing to instruct the jury that it needed to unanimously agree as to which acts Davis committed to find him guilty. Because Davis did not request this instruction or object to its omission at trial, this court reviews this issue for plain error. *See State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (stating that "[u]nobjected-to jury instructions are reviewed for plain error"). Davis must demonstrate that "(1) there was error; (2) the error was plain; and (3) his substantial rights were affected." *See id.* If each element is satisfied, this court should "assess[] whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

"Jury verdicts in all criminal cases must be unanimous." *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). Consequently, a jury must unanimously find that the state has proved each element of the charged offense. *Id.* at 730-31. "Whe[n] jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001). But "if the statute establishes alternative means for satisfying an element, unanimity on the means is not required." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

The state argues that, regardless of whether the district court erred and the error was plain, Davis cannot demonstrate prejudice. "An error affects a defendant's substantial

rights if the error was prejudicial and affected the outcome of the case." *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (quotation omitted). That is, "there must be a reasonable likelihood that the [failure to give] the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotations omitted). An appellant bears the "heavy" burden of persuasion on this third prong of the plain-error test. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

The state presented evidence that Davis walked into the store and flashed a gun at J.W. and J.K.W. Although it is not entirely clear from the surveillance video that Davis had a gun in his waistband, both J.W. and J.K.W. testified that the object in his waistband was a gun. Both witnesses testified that the gun was silver, and J.W. positively identified the gun found in the trunk of the car as the gun Davis flashed at her.

The state also presented a recording of a phone call between Davis and A.L. while Davis was in jail. Davis discussed A.L.'s potential testimony at trial, stating that she would be asked "have you ever seen Mr. Davis possess this firearm and stuff and like no I never seen him possess it." A.L. denied that Davis told her that she could testify that she had never seen him with a firearm. In addition, Davis admitted to making inconsistent statements concerning the incident.

The evidence against Davis, including the eyewitness testimony, jail call, and Davis's admission to giving inconsistent statements, was overwhelming. *See State v. Ayala-Leyva*, 848 N.W.2d 546, 552, 555 (Minn. App. 2014) (concluding that the appellant could not demonstrate prejudice as a result of the district court's failure to give a specific-unanimity instruction because "[t]he evidence of [the] appellant's guilt was overwhelming"

and "it [wa]s clear that the jury rejected [his] defense as unbelievable"), *review denied* (Minn., Aug. 11, 2015). We conclude that Davis cannot demonstrate that the district court's failure to give a specific-unanimity jury instruction was prejudicial. Therefore, we need not address whether the district court erred by failing to give that instruction or whether any error was plain.

Affirmed.